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Supreme Court, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE LABONTE,
ALFRED LAWRENCE HUNNEWELL, AND STEPHEN DYER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Sentencing Commission's implementation of the Career Offender Guideline conflicts with the Commission's obligation under 28 U.S.C. 994(h) to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of" career offenders.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-53a) is reported at 70 F.3d 1396. A prior opinion of the court of appeals affirming respondent Piper's conviction is reported at 35 F.3d 611, and a prior opinion affirming respondent Dyer's conviction is reported at 9 F.3d 1. The prior opinions of the court of appeals affirming the convictions of respondents LaBonte and Hunnewell are unpublished, but the judgments are noted at 19 F.3d 1427 (Table) and 10 F.3d 805 (Table), respectively. The order of the district court granting LaBonte's motion for resentencing (Pet. App. 54a-66a) is reported at 885 F. Supp. 19. The orders of the district court denying Hunnewell's and Piper's motions

for resentencing (Pet. App. 71a-72a, 73a-108a) and Dyer's motion under 28 U.S.C. 2255 (Pet. App. 67a-70a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1995. A petition for rehearing was denied on January 24, 1996. Pet. App. 109a-113a. The petition for a writ of certiorari was filed on April 23, 1996, and was granted on June 24, 1996. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND SENTENCING GUIDELINES PROVISIONS INVOLVED

The following provisions are set forth in an appendix to this brief: 21 U.S.C. 841 and 851, 28 U.S.C. 994, Sentencing Guidelines §§ 4B1.1 and 4B1.2 (Nov. 1, 1995), with accompanying Commentary, and Amendment 506 to the Guidelines Manual.

STATEMENT

Respondents George LaBonte, Alfred Lawrence Hunnewell, and Stephen Dyer, as well as defendant David E. Piper, were convicted of federal controlled substance offenses in the United States District Court for the District of Maine. Pet. App. 7a. Before November 1, 1994, each of the four was sentenced as a career offender under Sentencing Guidelines § 4B1.1 (Nov. 1, 1993). Pet. 3. The court of appeals affirmed each defendant's conviction and sentence. Subsequently, each defendant filed a motion seeking a reduction in his sentence based on an amendment to the career offender provision of the Sentencing Guidelines promulgated by the United States Sentencing Commission, effective November 1, 1994. In two of the cases, the district court found that the

amendment was contrary to the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1987, and refused to apply it. In the other two cases, another judge of the same district court found that the amendment was valid. The court of appeals consolidated the ensuing appeals. A divided panel of the court of appeals upheld the amendment, and affirmed in part, reversed in part, and remanded. Pet. App. 1a-53a.

1. In 1984, Congress created the United States Sentencing Commission and charged it with the responsibility to promulgate sentencing guidelines for the federal system. See 28 U.S.C. 991; *Mistretta v. United States*, 488 U.S. 361, 366 (1989). In addition to articulating general goals for federal sentencing that the Commission was directed to meet, see *Neal v. United States*, 116 S. Ct. 763, 767 (1996), Congress imposed a variety of specific requirements on the Commission. 28 U.S.C. 994(b)-(n). Among those requirements is the following provision, dealing with career offenders convicted of crimes of violence or drug trafficking crimes:

The [Sentencing] Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and [(1) has been convicted of a felony that is a crime of violence or a drug trafficking crime, and (2) has two prior felony convictions involving crimes of violence or drug trafficking crimes].

28 U.S.C. 994(h).

The Sentencing Commission implemented Section 994(h) in Section 4B1.1 of the Sentencing Guidelines, entitled "Career Offender," which provides as follows:

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. If the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case shall be Category VI.

<u>Offense Statutory Maximum</u>	<u>Offense Level*</u>
(A) Life	37
(B) 25 years or more	34
(C) 20 years or more, but less than 25 years	32
(D) 15 years or more, but less than 20 years	29
(E) 10 years or more, but less than 15 years	24
(F) 5 years or more, but less than 10 years	17
(G) More than 1 year, but less than 5 years	12

* If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

The applicable sentencing range is then derived from the Sentencing Table, Guidelines, Ch. 5, Pt. A.

In order to determine a defendant's offense level under the Career Offender Guideline, it is necessary

to identify the maximum sentence to which the defendant is exposed. Before November 1, 1994, the commentary to the Career Offender Guideline defined the phrase "Offense Statutory Maximum" to mean "the maximum term of imprisonment authorized for the offense of conviction." Guidelines § 4B1.1, Application Note 2 (Nov. 1, 1993). Neither the Guideline itself nor any accompanying commentary specified which "maximum term" was to be used when federal law established a basic statutory maximum for persons convicted of a particular offense, but also provided an enhanced statutory maximum term for persons convicted of that offense who also had prior convictions. Such enhanced sentences for recidivists are an integral feature of sentencing for federal narcotics crimes.¹ The courts of appeals that had addressed the question uniformly concluded that the "offense statutory maximum" for a defendant with prior convictions was the enhanced maximum term, not the maximum term authorized for a defendant with no prior convictions. See *United States v. Smith*, 984 F.2d 1084, 1086-1087 (10th Cir.), cert. denied, 114 S. Ct. 204

¹ See 21 U.S.C. 841(b)(1)(A), (B), (C) and (D); 21 U.S.C. 962. For example, Section 841(b)(1)(C) states that persons convicted of specified controlled substance offenses "shall be sentenced to a term of imprisonment of not more than 20 years." Section 841(b)(1)(C) further provides, however, that, "[i]f any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years." The enhanced penalties may be imposed only if "before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon." 21 U.S.C. 851(a)(1).

(1993); *United States v. Saunders*, 973 F.2d 1354, 1364 (7th Cir. 1992), cert. denied, 506 U.S. 1070 (1993); *United States v. Garrett*, 959 F.2d 1005, 1009-1011 (D.C. Cir. 1992); *United States v. Amis*, 926 F.2d 328, 330 (3d Cir. 1991); *United States v. Sanchez-Lopez*, 879 F.2d 541, 558-560 (9th Cir. 1989).

By Amendment 506, the Commission rejected the approach that had prevailed in the courts. Effective November 1, 1994, the Sentencing Commission amended the commentary to Guidelines § 4B1.1 to define the phrase "Offense Statutory Maximum" to mean "the maximum term of imprisonment authorized for the offense of conviction * * *, not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record." Guidelines § 4B1.1, Application Note 2. Thus, "where the statutory maximum term of imprisonment under 21 U.S.C. § 841(b)(1)(C) is increased from twenty years to thirty years because the defendant has one or more qualifying prior drug convictions, the 'Offense Statutory Maximum' for the purposes of this guideline is twenty years and not thirty years." *Ibid.* In promulgating the amendment, the Commission explained that by precluding use of the enhanced statutory maximums, Amendment 506 "avoids unwarranted double counting as well as unwarranted disparity associated with variations in the exercise of prosecutorial discretion in seeking enhanced penalties based on prior convictions." 59 Fed. Reg. 23,609 (1994). It also stated that "the enhanced maximum sentences provided for recidivist drug offenders * * * did not exist" at the time that 28 U.S.C. 994(h) was enacted. 59 Fed. Reg. at 23,609. Pursuant to its authority under 28 U.S.C. 994(u), the Commission

made Amendment 506 retroactive, so that a sentencing court would have discretion to reduce a sentence imposed before the effective date of the amendment.² See Guidelines § 1B1.10(c).

2. The court of appeals' decision involves consolidated appeals from four cases in which defendants moved for reductions of their sentences based on the amendment. All four defendants had been sentenced before the effective date of Amendment 506. In each case the district court had utilized the enhanced statutory maximum penalty in calculating the defendant's total offense level under Guidelines § 4B1.1 (Nov. 1, 1993). Each of the defendants subsequently moved for resentencing based on Amendment 506. The government argued that Amendment 506 is contrary to Section 994(h) and is therefore invalid. In two of the cases, the district court concluded that Amendment 506 is a valid exercise of the Commission's authority. The court reduced one defendant's sentence but declined to reduce the sentence of the other defendant, in light of the seriousness of that defendant's offense. In the other two cases, the district court determined that Amendment 506 is inconsistent with 28 U.S.C. 994(h) and thus invalid, and it therefore denied the defendants' motions for resentencing.

George LaBonte: After a plea of guilty, respondent LaBonte was convicted on one count of possession of cocaine with the intent to distribute it, in violation of

² The Department of Justice opposed the proposed amendment before the Commission, and, following its promulgation, determined that federal prosecutors should oppose the application of the amendment by sentencing courts on the ground that it is invalid as inconsistent with 28 U.S.C. 994(h).

21 U.S.C. 841(a)(1). At LaBonte's sentencing, the district court found that LaBonte qualified as a career offender. Based on LaBonte's prior drug convictions, the district court determined that his "offense statutory maximum" was more than 25 years' imprisonment and set his offense level at 34. After a three-level reduction for acceptance of responsibility, LaBonte had an offense level of 31 and a sentencing range of 188-235 months' imprisonment. The district court imposed a sentence of 188 months' imprisonment. The court of appeals dismissed LaBonte's appeal. 19 F.3d 1427 (1st Cir. 1994) (Table); see Pet. App. 7a-8a.

After the effective date of Amendment 506, LaBonte moved for resentencing under 18 U.S.C. 3582(c)(2).³ The district court concluded that the amendment is valid and granted LaBonte's motion. See Pet. App. 54a-66a. Using the definition of "offense statutory maximum" required by Amendment 506, the court found that LaBonte's total offense level was 32. See *id.* at 7a-8a. The court again deducted three levels for acceptance of responsibility. See *id.* at 8a. Application of Amendment 506 resulted in a sentencing range

³ That Section states that a sentencing court "may not modify a term of imprisonment once it has been imposed except that — * * * (2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant * * * the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) [of Title 18] to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. 3582(c)(2).

of 151 to 188 months' imprisonment. *Ibid.*; *id.* at 57a. The district court imposed a sentence of 151 months' imprisonment. *Id.* at 66a.

David E. Piper: After a plea of guilty, Piper was convicted of conspiracy to possess marijuana with the intent to distribute it, in violation of 21 U.S.C. 846, and using or carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1). The district court employed the enhanced statutory maximum and determined that Piper's offense level was 37. The court reduced that level by three based on Piper's acceptance of responsibility and calculated Piper's sentencing range as 262 to 327 months' imprisonment. Piper received a sentence of 300 months' imprisonment. The court of appeals affirmed. 35 F.3d 611 (1st Cir. 1994), cert. denied, 115 S. Ct. 1118 (1995); see Pet. App. 8a.

Piper later sought resentencing under Amendment 506, arguing that, if the unenhanced statutory maximum were used, his sentencing range would be 210 to 262 months' imprisonment. See Pet. App. 8a & n.3. The district court assumed that the amendment is valid, but declined to give Piper its benefit. *Id.* at 8a, 102a. The court noted that application of the amendment was discretionary, and it concluded that the amendment should not apply in Piper's case because of the seriousness of his offense. *Ibid.*

Alfred Lawrence Hunnewell: After a plea of guilty, Hunnewell was convicted on two counts of possessing controlled substances with the intent to distribute them, in violation of 21 U.S.C. 841(a)(1). Using the enhanced statutory maximum, the district court set Hunnewell's offense level at 34, deducted three levels for acceptance of responsibility, and found that Hunnewell's sentencing range was 188 to

235 months' imprisonment. The court sentenced Hunnewell to 188 months' imprisonment. The court of appeals affirmed. 10 F.3d 805 (1st Cir. 1993) (Table), cert. denied, 114 S. Ct. 1616 (1994); see Pet. App. 8a-9a.

After November 1, 1994, Hunnewell moved for a reduction in sentence. He asserted that application of Amendment 506 would lower his sentencing range to 151 to 188 months' imprisonment. See Pet. App. 9a n.4. The district court held that Amendment 506 is invalid because it is "in contravention of 21 U.S.C. § 841(b)(1)(C) and 28 U.S.C. § 994(h)." *Id.* at 71a. Accordingly, the court denied the motion for resentencing. *Ibid.*

Stephen Dyer: After a plea of guilty, Dyer was convicted of conspiracy to possess controlled substances with the intent to distribute them, in violation of 21 U.S.C. 841(a)(1). Using the enhanced statutory maximum, the district court set Dyer's total offense level at 34 and refused to reduce that level based on acceptance of responsibility, resulting in a sentencing range of 262 to 327 months' imprisonment. The court imposed a sentence of 262 months' imprisonment. The court of appeals affirmed. 9 F.3d 1 (1st Cir. 1993) (per curiam); see Pet. App. 9a.

After November 1, 1994, Dyer filed a petition under 28 U.S.C. 2255, seeking to have his conviction set aside. Pet. App. 9a. In the alternative, Dyer asked to be resentenced based on Amendment 506. *Ibid.* Amendment 506, if applied, would have reduced Dyer's Guidelines sentencing range to 210-262 months' imprisonment. *Id.* at 10a n.5. The district court denied the petition, rejecting Dyer's reliance on Amendment 506 on the basis of its prior decision on Hunnewell's request for resentencing. *Id.* at 70a.

3. The government appealed the district court's order granting LaBonte's motion for resentencing. Piper, Hunnewell, and Dyer appealed the district court orders denying their motions. The court of appeals consolidated the cases, and a divided panel held that Amendment 506 is valid. Pet. App. 1a-53a.

The court of appeals first determined that the two-step approach of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the judicial review of agency rules provides "the proper criterion for determining whether a guideline (or, for that matter, commentary that suggests how a guideline should be read) contravenes a statute." Pet. App. 11a. Under that approach, the court of appeals asked first whether Congress had addressed the precise question under review; if so, "that is the end of the matter." *Id.* at 12a (quoting *Chevron*, 467 U.S. at 842). If, however, the statute is silent or ambiguous on the issue, the "question for the court is whether the agency's answer is based on a permissible construction of the statute." *Ibid.* (quoting *Chevron*, 467 U.S. at 843). Applying that analysis, the court "f[ou]nd no clear congressional directive regarding the meaning of the term 'maximum' as that term is used in [28 U.S.C.] 994(h)." *Id.* at 19a. In the court's view, the meaning of the word "maximum" was influenced by its presence in the statutory phrase "maximum term authorized for categories of defendants." *Id.* at 14a. The court acknowledged that the phrase could mean that the "maximum term" is the enhanced maximum applicable to the "categor[y]" of repeat offenders for whom the government filed a notice of prior crimes under 21 U.S.C. 851(a)(1). Pet. App. 14a. But the court also thought that

[t]he word "categories" plausibly can be defined * * * to include all offenders (or all repeat offenders) charged with transgressing the same criminal statute, regardless of whether the prosecution chooses to invoke the sentence-enhancing mechanism against a particular defendant (e.g., all drug traffickers, or all repeat offender drug traffickers, who are charged with violating 21 U.S.C. § 841(a)(1)). On this view, the word "maximum" refers to the unenhanced statutory maximum (USM), see 21 U.S.C. § 841(b)(1), since this represents the highest possible sentence applicable to all defendants in the category.

Ibid. Based on that perceived ambiguity, the court asked whether the Commission's interpretation of the statute was a reasonable one. *Id.* at 19a.

The court of appeals concluded that "[t]he Career Offender Guideline, read through the prism of Amendment ~~506~~, adopts an entirely plausible version of the categorical approach that the statute suggests." Pet. App. 19a. It noted that "[t]he root purpose of the Career Offender Guideline, U.S.S.G. § 4B1.1, is to enhance repeat offenders' sentences," *id.* at 23a, and it determined that "[t]he revamped guideline not only accomplishes that purpose but also coheres with Congress's discernible aims in making enhanced penalties available under [21 U.S.C.] 841," *id.* at 23a-24a. The court also held that the Career Offender Guideline, as construed under Amendment 506, is a reasonable implementation of the directive in Section 994(h) to specify sentences "at or near" the maximum. *Id.* at 24a-28a.

The court of appeals then considered the application of Amendment 506 to the four defendants before it.

The court affirmed the district court's judgment reducing respondent LaBonte's sentence based on Amendment 506. Pet. App. 30a. The court also affirmed the judgment with respect to Piper. *Id.* at 30a-32a. The court of appeals rejected Piper's contention that the district court was required to resentence him in accordance with Amendment 506. It explained that the pertinent statutory provision (18 U.S.C. 3582(c)(2)) "authorize[d] the district judge to resentence when resentencing is consistent with the policies underlying [Amendment 506], but it neither compel[led] the judge to do so nor limit[ed] his inquiry to the consistency question." Pet. App. 30a.⁴ With respect to respondents Hunnewell and Dyer, the court of appeals set aside the district court's orders denying the motions for resentencing and remanded the cases so as to permit the district court to consider whether the respondents should be resentenced in accordance with Amendment 506. *Id.* at 32a-34a. The court also affirmed the district court's dismissal of Dyer's Section 2255 petition. *Id.* at 34a-37a.

Judge Stahl dissented from the majority's determination that Amendment 506 is valid.⁵ Judge Stahl concluded that Amendment 506's approach to the implementation of 28 U.S.C. 994(h) is

inherently implausible because it effectively nullifies the criminal history enhancements carefully

⁴ Defendant Piper did not seek further review of the court of appeals' decision affirming the district court's denial of his motion for reduction of sentence. Because the judgment of the court of appeals was adverse to Piper, our petition for a writ of certiorari did not name him as a respondent.

⁵ Judge Stahl concurred in the court of appeals' dismissal of respondent Dyer's Section 2255 petition. See Pet. App. 38a.

enacted in statutes like 21 U.S.C. § 841. These statutes, to which Congress expressly referred in the text of § 994(h), provide an intricate web of enhanced penalties applicable to defendants who are repeat offenders or whose offenses resulted in death or serious bodily injury. The [Commission's] interpretation, however, completely disregards these enhanced penalties because, under that interpretation, all defendants must be sentenced at or near the unenhanced maximum whether or not the enhanced penalties apply. Recognizing that Congress specifically referred to these statutes in the text of § 994(h), it seems absurd to suppose that Congress did not intend to preclude this result.

Pet. App. 40a. Judge Stahl also argued that "the legislative history strongly suggests that Congress intended 'maximum term authorized' [in 28 U.S.C. 994(h)] to refer, in appropriate circumstances, to the enhanced maximum penalty." *Id.* at 42a.⁶

SUMMARY OF ARGUMENT

A. Congress directed the Sentencing Commission to "assure" that, for adult offenders who commit their third felony drug offense or crime of violence, the

⁶ Along with the First Circuit in the instant case, the Ninth Circuit has upheld Amendment 506 as a permissible exercise of the Commission's discretion. *United States v. Dunn*, 80 F.3d 402 (9th Cir. 1996). The Seventh, Eighth, and Tenth Circuits have held that Amendment 506 is inconsistent with Section 994(h) and is therefore invalid. See *United States v. Hernandez*, 79 F.3d 584 (7th Cir. 1996), petitions for cert. pending, Nos. 95-8469, 95-9335; *United States v. Fountain*, 83 F.3d 946 (8th Cir. 1996); *United States v. Novey*, 78 F.3d 1483 (10th Cir. 1996), petition for cert. pending, No. 95-8791.

Guidelines specify a sentence of imprisonment "at or near the maximum term authorized." 28 U.S.C. 994(h). That language has a clear and unambiguous meaning. For repeat offenders of the federal narcotics laws, the maximum statutory terms of imprisonment are enhanced to reflect the defendants' status as recidivists. See, *e.g.*, 21 U.S.C. 841(b)(1). The "maximum term authorized" under Section 994(h) thus refers to the enhanced maximum, not to the lower ceiling applicable to first-time offenders.

The context surrounding the phrase "maximum term authorized" in Section 994(h) does not make the phrase ambiguous. Section 994(h) does refer to the Commission's obligation to establish sentencing ranges for "categories" of defendants. But that reference does not make it plausible to construe the words "maximum term authorized" to refer to a combined category of (1) recidivists who are eligible for the statutory enhancements (because the government has filed the information identifying prior convictions required by 21 U.S.C. 851), as well as (2) recidivists who are not eligible for the statutory enhancements (because the government did not file the required information). The word "authorized" itself connotes the statutory maximum prescribed by Congress—not the particular maximum applicable in a given case. And the reference to "categories" is explained by the remaining requirements of Section 994(h): that the defendant be 18 years old or older, be convicted of a drug offense or crime of violence, and have two prior qualifying convictions.

Section 994(h) does give the Commission latitude to prescribe sentences "at or near" the maximum. That authority, however, does not empower the Commission to select a lower than "maximum" term that the

sentences must approach or reach. Finally, the larger context of Section 994(h) further indicates that Congress had in mind the enhanced maximum terms for recidivists, rather than the unenhanced maximums for first-time offenders. Enhanced sentences for recidivists are a longstanding feature of federal narcotics law. Congress amended those very statutes contemporaneously with the enactment of Section 994(h). The legislature, therefore, was well aware that the "maximum" terms for many of the defendants covered by Section 994(h) were enhanced because of their prior convictions. The Commission's approach would virtually nullify those enhancements.

B. Amendment 506 is not intended to produce a Guideline range "at or near" the enhanced maximum term. Amendment 506 expressly defines the phrase "Offense Statutory Maximum" to mean "the maximum term of imprisonment authorized for the offense of conviction * * *, not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record." Guidelines § 4B1.1, Application Note 2. The amended commentary is contrary to Section 994(h) and is therefore invalid. *Stinson v. United States*, 508 U.S. 36, 38 (1993).

The Commission's stated justifications for Amendment 506 do not reconcile it with the statute. In any event, the Commission's reasoning is unsound. Use of the enhanced maximum in implementing Section 994(h) does not constitute improper "double counting" of prior convictions; it simply achieves the statutory mandate. Nor does use of the enhanced maximum create unwarranted disparity between individual defendants based on federal officials' exercise of prosecutorial discretion. As a practical matter, federal

prosecutors have discretion to determine (by filing or declining to file the information required by 21 U.S.C. 851(a)(1)) whether a particular defendant will be subject to an enhanced statutory maximum. Such disparities are not "unwarranted," however; they are a reflection of the prosecutorial discretion that is a basic characteristic of criminal law enforcement. Finally, if its aim is to deal with perceived unwarranted disparate treatment, the Commission's solution is overbroad, because it virtually precludes application of the enhanced statutory maximum terms. That outcome clearly contravenes the statute.

ARGUMENT

THE COMMISSION'S AMENDMENT OF THE COMMENTARY TO THE CAREER OFFENDER GUIDELINE TO TREAT AS THE MAXIMUM AUTHORIZED SENTENCES THE LOWER SENTENCES APPLICABLE TO FIRST-TIME OFFENDERS CONFLICTS WITH 28 U.S.C. 994(h)

The Sentencing Commission "enjoys significant discretion in formulating guidelines" for classes of federal offenders. *Mistretta v. United States*, 488 U.S. 361, 377 (1989). That discretion, however, is cabined by the directions that Congress gave to the Commission. *Id.* at 379. This case involves Congress's specific direction to the Commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized" for specified categories of repeat offenders. 28 U.S.C. 994(h). In response to that direction, the Commission promulgated Guidelines § 4B1.1 and set forth commentary to explain its application. That commentary can be valid only if it complies with applicable federal statutes, including Section 994(h);

if the commentary violates a statute, it is invalid. *Stinson v. United States*, 508 U.S. 36, 38 (1993) (“[C]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.”); cf. *Neal v. United States*, 116 S. Ct. 763 (1996).

In this case, respondents faced maximum terms of imprisonment that were enhanced by statute to reflect their recidivist status. Under the Commission’s Career Offender Guideline as explicated by Amendment 506, however, respondents are to be sentenced “at or near” statutory “maximum term[s]” calculated as though respondents were *not* recidivists. Guidelines § 4B1.1, Application Note 2. The Commission’s approach conflicts with Section 994(h). It cannot be reconciled with the language of the statute; it largely nullifies Congress’s decision to subject repeat offenders to enhanced statutory maximum terms of imprisonment; and it rests on no sound justification.

A. Section 994(h) Requires The Commission To Establish Sentences For Specified Repeat Offenders That Are At Or Near Maximum Terms Enhanced To Reflect The Offenders’ Recidivist Status

1. Section 994(h) states that “[t]he Commission shall assure that the guidelines specify a sentence to a term of imprisonment *at or near the maximum term authorized*” for specified categories of repeat offenders, *i.e.*, those who are 18 years of age or older and who have been convicted for the third time of a felony crime of violence or federal drug offense. 28 U.S.C. 994(h) (emphasis added). The phrase “maximum term authorized” refers to the maximum statu-

tory term provided for the offense of conviction, as the Commission has recognized: “the phrase ‘maximum term authorized’ should be construed as the maximum term authorized by statute.” Guidelines § 4B1.1 (background); see S. Rep. No. 225, 98th Cong., 1st Sess. 120 (1983) (“proposed 28 U.S.C. 994(h) requires the sentencing guidelines to specify a term of imprisonment at or near the statutory maximum for a third conviction of a felony that involves a crime of violence or drug trafficking.”).⁷

Congress has provided for enhanced maximum terms of imprisonment for recidivists, particularly drug recidivists. For example, 21 U.S.C. 841(b)(1)(C), applicable to drug traffickers, provides for a base “term of imprisonment of not more than 20 years,” but states that “[i]f any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years.”

⁷ In *United States v. R.L.C.*, 503 U.S. 291 (1992), this Court construed 18 U.S.C. 5037(c), which provides that the term of detention ordered for a juvenile found to be a juvenile delinquent may not extend beyond “the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult.” The Court held that the applicable “maximum term” was the upper limit of the Guidelines range that would apply to a similarly situated adult offender. 503 U.S. at 306-307. Section 994(h), however, is designed to constrain the Commissioner’s discretion in the promulgation of Guidelines for career offenders. It would be entirely circular to suggest that the Commission had complied with Section 994(h) simply by prescribing sentences “at or near” the top of the Guidelines range. Indeed, as noted in text, the Commission has recognized that the “maximum term authorized” within the meaning of Section 994(h) is the statutory maximum.

The maximum term authorized by statute for such a repeat offender, therefore, is 30 years, the enhanced statutory maximum—not 20 years, the unenhanced maximum. “The word ‘maximum’ naturally connotes the upper limit of a range, or the greatest quantity possible or permissible”; thus, “where a statute provides two tiers of punishment, common sense suggests that the maximum falls at the upper limit of the higher of the two tiers.” *United States v. Hernandez*, 79 F.3d 584, 595 (7th Cir. 1996).

The meaning of Section 994(h) is thus unambiguous. All defendants covered by Section 994(h) are recidivists, and a substantial number are subject to enhanced statutory maximum terms of imprisonment as a result of their recidivism.⁸ Section 994(h) requires the Commission to provide for sentences that

⁸ Not every defendant covered by Section 994(h) would be subject to an enhanced statutory maximum term of imprisonment based on his recidivist status. For example, a person who commits a narcotics offense in violation of 21 U.S.C. 841 after twice being convicted of crimes of violence would not be subject to an enhanced statutory maximum. In the government’s experience, however, the majority of defendants covered by Section 994(h) are repeat drug offenders like respondents who are subject to enhanced statutory maximum terms. Cf. U.S. Sentencing Comm’n, *1994 Annual Report* 75 (indicating that 63.4% of defendants sentenced as career offenders were convicted of drug trafficking offenses). In any event, Amendment 506 will have a practical impact only on persons who, like respondents, are subject to enhanced maximum terms of imprisonment based on their recidivist status. The amendment’s sole purpose and effect is to ensure that such defendants are subject to Guidelines ranges “at or near” the unenhanced rather than the enhanced statutory maximum. If (as we contend) the “maximum term authorized” for such defendants is the enhanced maximum, Amendment 506 subverts the operation of Section 994(h) in every case to which it is applied.

come close to or equal (*i.e.*, that are “at or near”) the enhanced “maximum term” that Congress has authorized for those repeat offenders. The lower term available to first-time offenders is not the “maximum term authorized” for three-time offenders such as respondents.

2. Statutory language must be read in context. *Reno v. Koray*, 115 S. Ct. 2021, 2025 (1995). Nothing in Section 994(h)’s context, however, permits the phrase “maximum term authorized” to be interpreted to mean “the lesser term of imprisonment that is authorized for defendants who lack prior convictions.” The court of appeals found ambiguity in the statute by observing that Section 994(h) refers to the “maximum term authorized for *categories of defendants*” (emphasis added). The court thought that the relevant “category of defendants” might be defined to include defendants for whom the government did not file an information under 21 U.S.C. 851(a)(1), and who were therefore ineligible for the recidivist enhancement.⁹ Pet. App. 14a. That is incorrect. First, Section 994(h)’s reference to the maximum term “authorized” for categories of defendants is naturally read to refer to the sentence authorized by statute. The statutorily authorized sentence is not changed by the government’s omission to file the procedural notice required by Section 851(a)(1) in a particular case; it simply

⁹ Section 851(a)(1) states that the enhanced penalties may be imposed only if “before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.” If the government fails to give the required notice, therefore, the enhanced maximum would not be available to the sentencing court in a particular case.

means that the defendant in that case may not be sentenced to the authorized maximum. "But a decision of that type in an individual case does not undo the fact that the enhanced penalties remain authorized for other repeat offenders convicted under section 841." *Hernandez*, 79 F.3d at 597.

Second, Section 994(h) itself makes clear what "categories of defendants" Congress had in mind: "The categories of defendants intended by Section 994(h) are expressly defined as those 'in which the defendant is eighteen years or older and —(1) has been convicted of a [qualifying] felony . . . ; and (2) has previously been convicted of two or more prior felonies, each of which is [a qualifying felony].'" *United States v. Novey*, 78 F.3d 1483, 1489 n.7 (10th Cir. 1996), petition for cert. pending, No. 95-8791. "The 'category' referred to is thus the recidivist or repeat offender category." *United States v. Fountain*, 83 F.3d 946, 952 (8th Cir. 1996). The "maximum [prison] term authorized" for that "category" is the enhanced sentence prescribed by law.

Nor does any flexibility in Section 994(h)'s phrase "at or near" the maximum imply that the statute allows sentences to be based on the unenhanced maximum term. As the Seventh Circuit has explained, "the question presented by Amendment 506 is not how close the offense level and resulting sentencing range must be to the statutory maximum. * * * The debate instead is over which statutory maximum the Commission is to aim for." *Hernandez*, 79 F.3d at 599. Accord *United States v. Fountain*, 83 F.3d at 952 ("The issue here is not how close the sentence must be to the statutory maximum, but to which statutory maximum it must be close."). Whatever latitude Section 994(h) affords the Commission in deciding how

close a sentence must come to the maximum to be "near" it, Section 994(h) does not permit the Commission to select as a "maximum term" a sentence that is lower than the actual term authorized by Congress.

Finally, Congress could not have overlooked the fact that many of the recidivists covered by Section 994(h) face longer "maximum" sentences than first-time offenders. When Section 994(h) was enacted, federal law already provided enhanced penalties for repeat drug offenders.¹⁰ See, e.g., 21 U.S.C. 841(b)(1)(A), (b)(1)(B) (1982) (enhancing maximum term from 15 to 30 years, and from 5 to 10 years, respectively, for a defendant with a prior conviction for "an offense punishable under this paragraph"). Indeed, the Comprehensive Crime Control Act of 1984, of which the Sentencing Reform Act was a part, amended those very provisions. See 98 Stat. 2068; S. Rep. No. 225, *supra*, at 258-259 (noting that under the "current structure of section 841, these maximum penalties would be doubled where the defendant has a prior felony drug conviction" and explaining that the amendment permits prior state and foreign, as well as federal, drug convictions to trigger enhancement). Congress is "generally presume[d] [to be] knowledgeable about existing law pertinent to the legislation it

¹⁰ In proposing Amendment 506, the Commission asserted that "the enhanced maximum sentences provided for recidivist drug offenders * * * did not exist" at the time that 28 U.S.C. 994(h) was enacted. 59 Fed. Reg. 23,609 (1994). That statement is incorrect. As the district court in the *LaBonte* case recognized, "[t]he exact amounts of the enhancements may have changed, but the concept was well in place when section 994(h) was enacted, and had been since at least 1970." Pet. App. 63a n.4; accord *United States v. Novey*, 78 F.3d at 1490-1491; *Hernandez*, 79 F.3d at 598 n.10.

enacts." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-185 (1988). In this case, where the text of Section 994(h) refers specifically to 21 U.S.C. 841, and the Senate Report accompanying the legislation describes the enhanced penalties applicable to recidivists under that provision, Congress must be understood to have had those enhancements in mind in referring to the "maximum term authorized."

3. Thus, all the available evidence indicates that Congress enacted Section 994(h) with the awareness that the maximum terms of imprisonment authorized for repeat drug offenders were greater than the maximum sentences for offenders with no prior convictions. There is no reason to suppose that Congress intended for the Commission to disregard those enhancement provisions in fashioning Guidelines ranges "at or near the maximum term authorized" for repeat offenders covered by the Career Offender Guideline. Indeed, to disregard those enhancements is "inherently implausible because it effectively nullifies the criminal history enhancements carefully enacted in statutes like 21 U.S.C. § 841." Pet. App. 40a (Stahl, J., dissenting); accord *Fountain*, 83 F.3d at 953; *Novey*, 78 F.3d at 1488.

B. Amendment 506 Does Not Require Consideration Of Enhanced Maximum Sentences And Is Therefore Invalid

Amendment 506 is not intended to produce a sentencing range that comes close to or equals the enhanced "maximum term" of imprisonment applicable to recidivists such as respondents. Rather, the Amendment explicitly bases sentences for career offenders on the maximum term "not including any increase in that maximum term under a sentencing enhancement provision that applies because of the de-

fendant's prior criminal record." Guidelines § 4B1.1, Application Note 2. By ignoring recidivist enhancements to "maximum" terms, the amendment violates the directive of Section 994(h), and it is therefore invalid. *Stinson v. United States*, 508 U.S. 36, 38 (1993).

None of the Commission's stated justifications for Amendment 506 reconciles it with Section 994(h). The Commission explained that, in its view, the amendment "avoids unwarranted double counting as well as unwarranted disparity associated with variations in the exercise of prosecutorial discretion in seeking enhanced penalties based on prior convictions." 59 Fed. Reg. 23,609 (1994). Quite apart from the fact that those rationales do not address the applicable statutory language, neither of them is sound on its own terms.

1. The Commission's allusion to "unwarranted double counting" is enigmatic. The reference may reflect the Commission's view that it is unfair for prior convictions to be used both to trigger the statutory enhancement and to increase the defendant's total offense level under the Career Offender Guideline. See *Hernandez*, 79 F.3d at 599 ("The notion that use of the enhanced maximum amounts to double counting * * * stems from the fact that the defendant's prior convictions trigger both the statutory enhancement and the Career Offender Guideline."). Alternatively, the perceived "double counting" may be the use of the defendant's prior convictions both in determining the total offense level and in computing the criminal history category. See *Novey*, 78 F.3d at 1486 ("Under [the government's] interpretation [of Guidelines § 4B1.1], a defendant's prior convictions are, in effect, used twice: first to enhance the defendant's criminal

history category and again to enhance the defendant's offense level."). As the district court in the *LaBonte* case recognized, see Pet. App. 63a n.4, neither version of the "double counting" objection has merit.

The "double counting" objection overlooks the purpose of Section 994(h): to ensure that Guidelines sentences for specified classes of repeat offenders will closely track the statutory maximum. Section 994(h)'s directive that the Guidelines specify a sentence of imprisonment for a career offender "at or near" the "maximum term authorized" necessarily requires that increases in that maximum statutory term will be translated by some mechanism into increases in the applicable Guidelines sentence. Calling that mechanism "double counting" does not undercut the fact that it is simply a way to elevate the Guidelines range in order to achieve compliance with the statutory mandate.¹¹

There is nothing inherently objectionable about a computation mechanism that considers prior convictions both in determining a defendant's criminal

¹¹ Indeed, even under Amendment 506, that form of "double counting" would still be present, albeit to a reduced extent. Guidelines § 4B1.1 provides that in determining the guideline range for a career offender, "[i]f the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply." It also provides that "[a] career offender's criminal history category in every case shall be Category VI." See page 4, *supra*. Because the table is used only if a defendant is a career offender (*i.e.*, only if he has at least two prior felony convictions of the specified type), the Guideline thus expressly uses a defendant's prior convictions in increasing his offense level, as well as in determining his criminal history category.

history category and in increasing his offense level. As the district court explained,

there is no double counting in the automatic assignment of the highest criminal history category and an increase for the total offense level, because the whole exercise is simply designed to yield, by formula, a sentence that will be at or near the maximum of something, and the only question is what that "something" should be.

Pet. App. 63a n.4. Section 994(h) requires the Commission to "assure" that repeat offenders covered by its provisions will, as a general matter, be subject to Guidelines sentences "at or near the maximum term authorized." The propriety of Amendment 506 ultimately depends on whether the sentencing ranges it produces satisfy that congressional directive. Conceivably, the Commission could devise an alternative computation mechanism that is consistent with Section 994(h) yet avoids the "double counting" of prior convictions. But the Commission's desire to avoid such double counting cannot justify adoption of a sentencing scheme that fails to meet Section 994(h)'s requirements.

2. The Commission's second justification for Amendment 506 posits that if the government files an information under 21 U.S.C. 851 for one defendant, but not another, the resulting difference in the maximum possible term is an "unwarranted disparity." Use of the enhanced statutory maximum in applying the Career Offender Guideline, however, does not create "unwarranted disparity" between individual defendants based on federal officials' exercise of prosecutorial discretion. Under Section 851(a)(1), the enhanced statutory maximum penalties for narcotics offenses

may be imposed only if the government has given the defendant pretrial notice of the prior convictions on which the government intends to rely. See note 9, *supra*. Thus, as a practical matter, federal prosecutors have discretion to determine (by filing or declining to file the requisite notice) whether a particular narcotics defendant will be subject to an enhanced statutory maximum term of imprisonment. Congress evidently did not regard the resulting disparities as "unwarranted," however, or it would not have made the applicability of the enhanced maximum terms contingent upon the government's filing of the information described in Section 851(a)(1).¹²

More fundamentally, prosecutorial discretion is an inherent feature of criminal law enforcement. *United States v. Armstrong*, 116 S. Ct. 1480, 1486 (1996). The discretion extends not only to what charges to bring, *ibid.*, but also, in certain instances, to what sentencing options are available to the court. See *Melendez v. United States*, 116 S. Ct. 2057 (1996) (sentencing court may generally not depart below a statutory mandatory minimum sentence without a motion filed

¹² The Commission's rationale also overlooks that Section 994(h) applies to persons who commit "crime[s] of violence" after having twice been convicted of violent crimes or of specified drug offenses. Federal law imposes enhanced maximum terms of imprisonment for some repeat offenders who have committed violent crimes. See 18 U.S.C. 2114 (postal robbery), 2247 (recidivist statute governing sexual abuse at specified locations). The applicability of those enhanced penalties does not require that the government provide the defendant with prior notice of the convictions on which it intends to rely at sentencing. Cf. *Oyler v. Boles*, 368 U.S. 448, 452 (1962) (due process does not require pretrial notice of applicability of recidivist enhancement).

by the government requesting that action under 18 U.S.C. 3553(e)). The fact that the statutory recidivist enhancements for drug offenders depend on the prosecutor's filing of an information under 21 U.S.C. 851(a)(1) provides another example of prosecutorial discretion. "The disparities in the sentences assigned to career offenders cannot be described as mere happenstance, then, but as the foreseeable result of the discretion that Congress has assigned to (and left with) prosecutors." *Hernandez*, 79 F.3d at 600. And insofar as Amendment 506 prevents "disparity associated with variations in the exercise of prosecutorial discretion," it does so by virtually eliminating the government's ability to invoke the enhanced statutory maximum sentences in any case. That rationale for Amendment 506 cannot be squared with a statutory scheme requiring sentences for career offenders "at or near" those maximum terms.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded with instructions to affirm the judgments of the district court with respect to respondents Hunnewell and Dyer, and to reverse the judgment of the district court with respect to respondent LaBonte.

Respectfully submitted.

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APPENDIX

1. Section 841 of Title 21 of the United States Code provides:

§ 841. Prohibited acts A**(a) Unlawful acts**

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(1a)

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 1 kilogram or more of a mixture or substance

containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$4,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$8,000,000 if the defendant is an individual or \$20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose

a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance

containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

(viii) 10 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$2,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final,

such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$4,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$1,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a

prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$2,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$250,000 if the

defendant is an individual or \$1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$500,000 if the defendant is an individual or \$2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$250,000 if the defendant is an individual or \$1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in

accordance with the provisions of title 18 or \$500,000 if the defendant is an individual or \$2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$100,000 if the defendant is an individual or \$250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$200,000 if the defendant is an individual or \$500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana

for no remuneration shall be treated as provided in section 844 of this title and section 3607 of title 18.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed—

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of title 18;

(C) \$500,000 if the defendant is an individual; or

(D) \$1,000,000 if the defendant is other than an individual;

or both.

(6) Any person who violates subsection (a) of this section, or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use—

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18 or imprisoned not more than five years, or both.

(c) Repealed. Pub. L. 98-473, title II, § 224(a)(2), formerly § 224(a)(6), Oct. 12, 1984, 98 Stat. 2030, as renumbered by Pub. L. 99-570, title I, § 1005(a)(2), Oct. 27, 1986, 100 Stat. 3207-6

(d) Offenses involving listed chemicals

Any person who knowingly or intentionally—

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required; shall be fined in accordance with title 18 or imprisoned not more than 10 years, or both.

(e) Boobytraps on Federal property; penalties; "boobytrap" defined

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term

of imprisonment for not more than 10 years and shall be fined not more than \$10,000.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years and shall be fined not more than \$20,000.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(f) Ten-year injunction as additional penalty

In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, or importation of a listed chemical may be enjoined from engaging in any regulated transaction involving a listed chemical for not more than ten years.

(g) Wrongful distribution or possession of listed chemicals

(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall be fined under title 18 or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been

adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under title 18 or imprisoned not more than one year, or both.

2. Section 851 of Title 21 of the United States Code provides:

§ 851. Proceedings to establish prior convictions

(a) Information filed by United States Attorney

(1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

(b) Affirmation or denial of previous conviction

If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

(c) Denial; written response; hearing

(1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1) of this section. The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

(d) Imposition of sentence

(1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior convictions, the court shall proceed to impose sentence upon him as provided by this part.

(2) If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the United States attorney, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by this part. The person may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered.

(e) Statute of limitations

No person who stands convicted of an offense under this part may challenge the validity of any prior

conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.

(Pub. L. 91-513, title II, § 411, Oct. 27, 1970, 84 Stat. 1269.)

3. Section 954 of Title 28 of the United States Code provides:

§ 994. Duties of the Commission

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of this title and title 18, United States Code, shall promulgate and distribute to all courts of the United States and to the United States Probation System—

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term;

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and

(E) a determination under paragraphs (6) and (11) of section 3563(b) of title 18;

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of—

(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18;

(D) the fine imposition provisions set forth in section 3572 of title 18;

(E) the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1); and

(F) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624(c) of title 18; and

(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18.

(b)(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

(2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents¹ of an appropriate sentence, and shall take them into

¹ So in original, Probably should be "incidence".

account only to the extent that they do have relevance—

(1) the grade of the offense;

(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

(4) the community view of the gravity of the offense;

(5) the public concern generated by the offense;

(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

(7) the current incidence of the offense in the community and in the Nation as a whole.

(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

- (1) age;
- (2) education;
- (3) vocational skills;

(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

(5) physical condition, including drug dependence;

- (6) previous employment record;
- (7) family ties and responsibilities;
- (8) community ties;
- (9) role in the offense;
- (10) criminal history; and

(11) degree of dependence upon criminal activity for a livelihood.

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

(e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.

(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular

attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

(g) The Commission, in promulgating guidelines pursuant to subsection (a)(1) to meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code, shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.

(h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—

(1) has been convicted of a felony that is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.); and

(2) has previously been convicted of two or more prior felonies, each of which is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(i) The Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant—

(1) has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions;

(2) committed the offense as part of a pattern of criminal conduct from which the defendant derived a substantial portion of the defendant's income;

(3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity;

(4) committed a crime of violence that constitutes a felony while on release pending trial, sentence, or appeal from a Federal, State, or local felony for which he was ultimately convicted; or

(5) committed a felony that is set forth in section 401 or 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21

U.S.C. 841 and 960), and that involved trafficking in a substantial quantity of a controlled substance.

(j) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

(k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

(l) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect—

(1) the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of—

(A) multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses; and

(B) multiple offenses committed at different times, including those cases in which the subsequent offense is a violation of section 3146 (penalty for failure to appear) or is committed while the person is released pursuant to the provisions of section 3147 (penalty for an

offense committed while on release) of title 18; and

(2) the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation.

(m) The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

(o) The Commission periodically shall review and revise, in consideration of comments and data coming

to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

(p) The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective date is revised or the

amendment is otherwise modified or disapproved by Act of Congress.

(q) The Commission and the Bureau of Prisons shall submit to Congress an analysis and recommendations concerning maximum utilization of resources to deal effectively with the Federal prison population. Such report shall be based upon consideration of a variety of alternatives, including—

- (1) modernization of existing facilities;
- (2) inmate classification and periodic review of such classification for use in placing inmates in the least restrictive facility necessary to ensure adequate security; and
- (3) use of existing Federal facilities, such as those currently within military jurisdiction.

(r) The Commission, not later than two years after the initial set of sentencing guidelines promulgated under subsection (a) goes into effect, and thereafter whenever it finds it advisable, shall recommend to the Congress that it raise or lower the grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate.

(s) The Commission shall give due consideration to any petition filed by a defendant requesting modification of the guidelines utilized in the sentencing of such defendant, on the basis of changed circumstances unrelated to the defendant, including changes in—

- (1) the community view of the gravity of the offense;

(2) the public concern generated by the offense; and

(3) the deterrent effect particular sentences may have on the commission of the offense by others.

(t) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

(u) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

(v) The Commission shall ensure that the general policy statements promulgated pursuant to subsection (a)(2) include a policy limiting consecutive terms of imprisonment for an offense involving a violation of a general prohibition and for an offense involving a violation of a specific prohibition encompassed within the general prohibition.

(w) The appropriate judge or officer shall submit to the Commission in connection with each sentence imposed (other than a sentence imposed for a petty offense, as defined in title 18, for which there is no applicable sentencing guideline) a written report of

the sentence, the offense for which it is imposed, the age, race, and sex of the offender, information regarding factors made relevant by the guidelines, and such other information as the Commission finds appropriate. The Commission shall submit to Congress at least annually an analysis of these reports and any recommendations for legislation that the Commission concludes is warranted by that analysis.

(x) The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.

(y) The Commission, in promulgating guidelines pursuant to subsection (a)(1), may include, as a component of a fine, the expected costs to the Government of any imprisonment, supervised release, or probation sentence that is ordered.

4. Section 4B1.1 of the Federal Sentencing Guidelines provides:

PART B - CAREER OFFENDERS AND CRIMINAL LIVELIHOOD

§ 4B1.1. Career Offender

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. If the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career of-

fender's criminal history category in every case shall be Category VI.

Offense Statutory Maximum Offense Level*

(A) Life	37
(B) 25 years or more	34
(C) 20 years or more, but less than 25 years	32
(D) 15 years or more, but less than 20 years	29
(E) 10 years or more, but less than 15 years	24
(F) 5 years or more, but less than 10 years	17
(G) More than 1 year, but less than 5 years	12

*If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

Commentary

Application Notes:

1. "Crime of violence," "controlled substance offense," and "two prior felony convictions" are defined in §4B1.2.
2. "Offense Statutory Maximum," for the purposes of this guideline, refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense, not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior crimi-

nal record (such sentencing enhancement provisions are contained, for example, in 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), (b)(1)(C), and (b)(1)(D)). For example, where the statutory maximum term of imprisonment under 21 U.S.C. § 841(b)(1)(C) is increased from twenty years to thirty years because the defendant has one or more qualifying prior drug convictions, the "Offense Statutory Maximum" for the purposes of this guideline is twenty years and not thirty years. If more than one count of conviction is a crime of violence or controlled substance offense, use the maximum authorized term of imprisonment for the count that authorizes the greatest maximum term of imprisonment.

Background: Section 994(h) of Title 28, United States Code, mandates that the Commission assure that certain "career" offenders receive a sentence of imprisonment "at or near the maximum term authorized." Section 4B1.1 implements this directive, with the definition of a career offender tracking in large part the criteria set forth in 28 U.S.C. § 994(h). However, in accord with its general guideline promulgation authority under 28 U.S.C. § 994(a)-(f), and its amendment authority under 28 U.S.C. § 994(o) and (p), the Commission has modified this definition in several respects to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of

similar criminal conduct" 28 U.S.C. § 991(b)(1)(B). The Commission's refinement of this definition over time is consistent with Congress's choice of a directive to the Commission rather than a mandatory minimum sentencing statute ("The [Senate Judiciary] Committee believes that such a directive to the Commission will be more effective; the guidelines development process can assure consistent and rational implementation for the Committee's view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers." S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983)).

The legislative history of this provision suggests that the phrase "maximum term authorized" should be construed as the maximum term authorized by statute. See S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983); 128 Cong. Rec. 26,511-12 (1982) (text of "Career Criminals" amendment by Senator Kennedy); *id.* at 26,515 (brief summary of amendment); *id.* at 26,517-18 (statement of Senator Kennedy).

Historical Notes: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendments 47 and 48); November 1, 1989 (see Appendix C, amendments 266 and 267); November 1, 1992 (see Appendix C, amendment 459); November 1, 1994 (see Appendix C, amendment 506); November 1, 1995 (see Appendix C, amendment 528).

5. Section 4B1.2 of the Federal Sentencing Guidelines provides:

§ 4B1.2 Definitions of Terms Used in Section 4B1.1

- (1) The term "crime of violence" means any offense under federal or state law punishable by imprisonment for a term exceeding one year that—
 - (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
 - (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.
- (2) The term "controlled substance offense" means an offense under a federal or state law prohibiting the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.
- (3) The term "two prior felony convictions" means (A) the defendant committed the instant offense subsequent

to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (B) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.

Commentary

Application Notes:

1. The terms "crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.
2. "Crime of violence" includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included where (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (*i.e.*, expressly

charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device), or, by its nature, presented a serious potential risk of physical injury to another. Under this section, the conduct of which the defendant was convicted is the focus of inquiry.

The term "crime of violence" does not include the offense of unlawful possession of a firearm by a felon. Where the instant offense is the unlawful possession of a firearm by a felon, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provides an increase in offense level if the defendant has one or more prior felony convictions for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. § 924(e), §4B1.4 (Armed Career Criminal) will apply.

3. "Prior felony conviction" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction

in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

4. The provisions of §4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under §4B1.1.

Historical Note: Effective November 1, 1987, Amended effective January 15, 1988 (see Appendix C, amendment 49); November 1, 1989 (see Appendix C, amendment 268); November 1, 1991 (see Appendix C, amendment 433); November 1, 1992 (see Appendix C, amendment 461); November 1, 1995 (see Appendix C, amendment 528).

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6. Amendment 506 to the Guidelines Manual provides:

506. The Commentary to §4B1.1 captioned "Application Notes" is amended in Note 2 by deleting:

"'Offense Statutory Maximum' refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense.",

and inserting in lieu thereof:

"'Offense Statutory Maximum,' for the purposes of this guideline, refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense, not including any increase in that maximum

term under a sentencing enhancement provision that applies because of the defendant's prior criminal record (such sentencing enhancement provisions are contained, for example, in 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), (b)(1)(C), and (b)(1)(D)). For example, where the statutory maximum term of imprisonment under 21 U.S.C. § 841(b)(1)(C) is increased from twenty years to thirty years because the defendant has one or more qualifying prior drug convictions, the 'Offense Statutory Maximum' for the purposes of this guideline is twenty years and not thirty years."

This amendment defines the term "offense statutory maximum" in §4B1.1 to mean the statutory maximum prior to any enhancement based on prior criminal record (*i.e.*, an enhancement of the statutory maximum sentence that itself was based upon the defendant's prior criminal record will not be used in determining the alternative offense level under this guideline). This rule avoids unwarranted double counting as well as unwarranted disparity associated with variations in the exercise of prosecutorial discretion in seeking enhanced penalties based on prior convictions. It is noted that when the instruction to the Commission that underlies §4B1.1 (28 U.S.C. § 994(h)) was enacted by the Congress in 1984, the enhanced maximum sentences provided for recidivist drug offenders (*e.g.*, under 21 U.S.C. § 841) did not exist. **The effective date of this amendment is November 1, 1994.**